

# Exhibit 1

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 TAL PROPERTIES of POMONA LLC,

4 Plaintiff,

5 -against- 17 Civ. 2928 (CS)

6 VILLAGE of POMONA, et al.,

7 Defendants.

8-----x

9  
10 United States Courthouse  
11 White Plains, New York

12 January 10, 2018

13 Before:

14 HON. CATHY SEIBEL,  
15 District Court Judge

16 A P P E A R A N C E S:

17 SUSSMAN & WATKINS  
18 Attorney for Plaintiff  
19 1 Railroad Avenue 3  
20 Goshen, New York 10924  
21 BY: MICHAEL H. SUSSMAN (By phone)

22 WILSON ELSER MOSKOWITZ EDELMAN & DICKER  
23 Attorneys for Defendants  
24 1133 Westchester Avenue  
25 White Plains, New York 10604  
BY: JANINE A. MASTELLONE

## PROCEEDINGS

2 THE COURT: Hi, Mr. Sussman.

3 MR. SUSSMAN: Yes, your Honor.

4 THE COURT: You sure you want to do this,  
5 Mr. Sussman? You can always order the transcript.

6 MR. SUSSMAN: I haven't heard anything. I'll stay on  
7 the line. Thank you. Has anybody spoken? I haven't heard  
8 anything.

9                   THE COURT: Nobody said anything. I understand  
10 you're dealing with a personal matter, if you would --

11 MR. SUSSMAN: I'm sorry I'm not there. Thank you.

12 THE COURT: I'm giving you an out if you --

13 MR. SUSSMAN: I understand. I appreciate it.

14 THE COURT: All right.

15 MR. SUSSMAN: I'm okay just sitting here talking.

16 THE COURT: And Ms. Mastellone, you can have a seat.

17 MS. MASTELLONE: Thank you, your Honor.

18 THE COURT: Any last words anybody wants to add  
19 beyond what's in the motion papers?

20 MS. MASTELLONE: No. Thank you, your Honor.

THE COURT: All right, so I'm just going to read my decision.

23 It's a motion to dismiss the second amended  
24 complaint or SAC. I accept as true the facts, although not the  
25 conclusions in the SAC. Plaintiff is TAL Properties of Pomona,

1 which is an LLC that conducts business in Rockland County. The  
2 sole owner of TAL is Avrohom Manes, who's an Orthodox Jew  
3 residing in Rockland County. He's not named in the caption as  
4 a plaintiff, but he is named in the body. So I am assuming it  
5 is intended he is a plaintiff.

6 The defendant, Village of Pomona, is in Rockland  
7 County. The defendant, Brent Yagel is the mayor of the Village  
8 and the defendant Doris Ulman is the Village attorney. The  
9 caption doesn't name her as a defendant, but the body does, so  
10 I assume she's meant to be a defendant.

11 Plaintiffs sue both Yagel and Ulman in both their  
12 official and individual capacities. Plaintiffs allege that  
13 both individual defendants knew that Manes was Jewish.

14 In December 2015, plaintiffs bought a residential  
15 home, which I'm going to call the property, at 22 High Mountain  
16 Road in the Village. In January 2016, they made repairs to the  
17 property. The same month the Village building inspector, Louis  
18 Zummo, inspected the property and advised plaintiffs that the  
19 work had been completed in accordance with the applicable codes  
20 and regs and that a C of O should be issued, a certificate of  
21 occupancy should be issued. Despite plaintiffs qualifying for  
22 the issuance of a C of O, Yagel and Ulman are alleged to have  
23 directed Zummo not to issue the certificate. They are alleged  
24 to have acted in contravention of the Village Construction  
25 Code, Chapter 47-10, which, according to plaintiffs, requires

1 the issuance of the CO because the property complied with the  
2 applicable code requirements.

3           In seeking to justify the Village's refusal to issue  
4 the CO, Yagel, acting through Ulman, claimed that a previous  
5 owner of the property owed the Village \$6,379.34 and demanded  
6 that plaintiffs pay this debt in exchange for the CO. At no  
7 time did defendants claim the plaintiffs incurred the debt or  
8 have any basis for such a claim. Plaintiffs allege that  
9 refusing to grant the CO on that basis is not based in law,  
10 does not represent the Village's general practice and is  
11 without precedent. Yagel and Ulman allegedly failed to take  
12 any action to collect the sum of 6300 and change from the  
13 previous owner, who is not Jewish, and that they allegedly  
14 permitted the previous owner's developer bond to lapse without  
15 collection even though the developer failed to develop and  
16 complete roads secured by the bond.

17           During the time plaintiffs sought to sell the home,  
18 defendants are alleged to have repeatedly used unspecified  
19 false explanations for delays in the issuance of the CO, thus  
20 preventing plaintiffs from alienating their property.  
21 Plaintiffs attempted to grade slopes on the property to create  
22 usable backyard space and to enhance the property's value. The  
23 Village engineer worked with plaintiff's engineer to develop a  
24 plan to address the slopes and initially approved the plan.  
25 But after being pressured by Yagel and Ulman, the Village

1 engineer retracted his approval, disavowed the plan and imposed  
2 costly conditions on plaintiffs.

3                   Zummo then advised the engineer, although the SAC  
4 does not say whether that refers to the Village engineer or  
5 plaintiff's engineer, that he would longer participate in this  
6 allegedly selective enforcement against plaintiffs. Zummo and  
7 the Village clerk have both told Manes that Yagel and Ulman  
8 advised them to give Manes a hard time with anything he needed.  
9 The conditions imposed, which owners of "similarly sloped"  
10 properties allegedly did not have to satisfy, required  
11 plaintiffs to post a bond to insure that plaintiffs did not  
12 damage their neighbor's property, which plaintiffs claim was  
13 highly unusual; show that the original surveyor whose work  
14 product plaintiffs used in their submission authorized  
15 plaintiff to use his work, which, according to plaintiffs, was  
16 highly unusual, as land surveys are typically relied upon  
17 without such authorization; and test the compressed fill they  
18 used for grading in a manner inconsistent with requirements  
19 imposed on others using such fill for similar projects.

20                   Although plaintiffs agreed to comply with these  
21 requirements, the Village still rejected plaintiff's  
22 application and did not issue a permit for the grading work.

23                   In the fall of 2016, plaintiffs entered into a  
24 contract to sell the property. By this point, the Village had  
25 dropped any claim that plaintiffs owed the debt incurred by the

1 previous owner and the Village had issued a CO. Following the  
2 sale of the property, the Village threatened to withdraw the CO  
3 if plaintiffs failed to sign an agreement acknowledging, among  
4 other things, that the road accessing the property was not a  
5 Village road and that its maintenance was the sole  
6 responsibility of the property's owner. Plaintiffs allege this  
7 requirement was contrary to Village practice, not authorized by  
8 the Village code and another *ultra vires* action taken by the  
9 Village dictated by Yagel and Ulman to impede and complicate  
10 plaintiff's alienation of the property.

11 Plaintiffs allege that the delays in issuing the  
12 required CO and the discriminatory imposition of grading  
13 requirements cost plaintiff to incur a substantial decline in  
14 the sales price of the property and prevented plaintiffs from  
15 using the proceeds from a sale for other profitable business  
16 opportunities.

17 TAL filed this lawsuit in state Court on March 16,  
18 2017 and defendants removed it to federal court on April 21,  
19 2017. Defendant sent a letter requesting a premotion  
20 conference on May 12 and plaintiffs responded by filing the  
21 first amended complaint on July 5th. The first amended  
22 complaint added Manes as a plaintiff and removed many  
23 defendants. Defendants then asked for a premotion conference  
24 again on July 26. Plaintiff responded by letter on July 31,  
25 and we had a conference on August 25. Plaintiffs then filed

1 the SAC on September 7, it contains two claims, both under  
2 Section 1983, one for violation of the Equal Protection Clause  
3 of the Fourteenth Amendment based on the theory that defendants  
4 engaged in selective enforcement against plaintiffs based on  
5 Manes' religion; and, second, a claim that by intentionally  
6 imposing harsher conditions on plaintiffs than on non-Jewish  
7 developers, defendants burdened the free exercise of Manes's  
8 religion. Defendants moved to dismiss on October 16.

9                 On a Rule 12(b) motion, the familiar standards of  
10 *Iqbal* and *Twombly* apply. Defendants raise four grounds for  
11 dismissal: One that plaintiffs lack standing to demand  
12 damages; two, that they failed to sufficiently plead the  
13 elements of both constitutional violations; three, that the  
14 individual defendants are entitled to qualified immunity, and,  
15 four, that plaintiffs failed to sufficiently plead *Monell*  
16 liability.

17                 The first argument is that plaintiffs lack standing  
18 to sue at least insofar as they allege claims arising from the  
19 Village's unsuccessful attempt to collect the debt incurred by  
20 the previous property owner. If the claim in this case were  
21 that the Village's collection attempt violated state law or a  
22 federal statute, defendants might be right that plaintiffs had  
23 suffered no concrete injury. But plaintiffs are not alleging  
24 concrete injury from having had to make a wrongful payment.  
25 Plaintiffs are alleging that they suffered concrete injury,

1 that is, lost money, from being subjected to unfair impediments  
2 in connection with their CO on the basis of plaintiff, Manes's,  
3 religion and that the claim that plaintiffs owed the prior  
4 owner's debt was a pretext for that discrimination. If they  
5 could so prove, the violation of their equal protection rights  
6 would be a sufficient injury. Likewise, contrary to  
7 defendants' argument, plaintiffs are not claiming injury from  
8 an otherwise proper land use approval process that just took  
9 too long as one would in a due process or takings case.  
10 Plaintiffs are alleging discrimination based on religion, so  
11 the loss of money and emotional stress they allege suffice to  
12 demonstrate standing.

13           I will now address each alleged constitutional  
14 violation in turn.

15           First, the selective enforcement claim. A plaintiff  
16 can bring a 1983 claim under the Equal Protection Clause which,  
17 among other things, bars the government from selective adverse  
18 treatment of individuals compared with other similarly situated  
19 individuals if such selective treatment was based on  
20 impermissible considerations such as race, religion, intent to  
21 inhibit or punish the exercise of constitutional rights or  
22 malicious or bad faith intent to injure a person. *Bizzarro*  
23 *versus Miranda*, 394 F.3D 82, 86. To properly state a claim for  
24 selective enforcement, plaintiff has to show, not surprisingly,  
25 that, one, the person compared with others similarly situated

1 was selectively treated; and, two, that the selective treatment  
2 was based on impermissible consideration such as religion.  
3 *LeClair versus Saunders*, 627 F.2d 606, 609-10; accord *Zahra*  
4 *Town of Southold*, 48 F.3d 674, 683. To satisfy the first prong  
5 plaintiffs must, at a minimum, plausibly allege comparators  
6 that are similarly situated in all material respects. *Sharp*  
7 *versus City of New York*, 2013 WL 2356063 at \*4 (E.D.N.Y.,  
8 May 29, 2013) aff'd 560 F.App'x 78. Exact correlations are not  
9 required, but at least a rough similarity is. *Mosdos Chofetz*  
10 *Chaim Inc. versus Wesley Hills*, 815 F.Supp. 2d 679, 698  
11 (S.D.N.Y., 2011), where the Court said that, at the motion to  
12 dismiss stage, the court must still determine whether, based on  
13 the plaintiff's allegations in the complaint, it is plausible  
14 that a jury could ultimately determine that the comparators are  
15 similarly situated. Conclusory allegations of selective  
16 treatment are insufficient to state an equal protection claim.  
17 *Bishop versus Best Buy* 2010 WL 4159566 at \*11 (S.D.N.Y.,  
18 October 13, 2010), on reconsideration 2011 WL 4011449,  
19 (September 8, 2011), aff'd 518 F.App'x 55. See *Segreto versus*  
20 *Town of Islip*, 2014 WL 737531 at \*7 (Eastern District of New  
21 York, February 24, 2014) where the court dismissed an equal  
22 protection claim where plaintiffs merely alleged that others  
23 were allowed to get permits but it was unclear whether those  
24 properties had any circumstances similar to plaintiff. To  
25 satisfy the second prong, plaintiff can offer both direct and

1 circumstantial evidence of discriminatory intent. *Chabad*  
2 *Lubavitch of Litchfield County versus Litchfield Historic*  
3 *District*, 768 F.3d 183, 199, but must offer more than  
4 conclusory allegations of disparate treatment and personal  
5 opinions that such treatment was motivated by discriminatory  
6 intent. *Morales versus New York* F.Supp. 3d 256, 275 (S.D.N.Y.,  
7 2014).

8 Plaintiffs appear to have alleged three incidents of  
9 selective treatment: One, defendants' delay in issuing a CO,  
10 including defendants' request that plaintiffs pay the debt on  
11 the property incurred by the previous owner; two, defendants'  
12 requirement that plaintiffs fulfill certain conditions before  
13 receiving a grading permit for their property; and, three,  
14 defendants' request the plaintiff sign an agreement in exchange  
15 for maintaining the certificate of occupancy. Other property  
16 owners on High Mountain Road are similarly situated and were  
17 not subject to similar treatment.

18 Plaintiff's allegations regarding similarly situated  
19 persons are conclusory. Although the SAC details plaintiff's  
20 travails in obtaining a certificate of occupancy and a grading  
21 permit, it does not provide specific examples of similarly  
22 situated persons applying for a CO or a grading permit, much  
23 less examples of similarly situated persons receiving  
24 preferential treatment. See *Amid versus Village of Old*  
25 *Brookville*, 2013 WL 52772 at \*6 (E.D.N.Y., February 7, 2016),

1 where the Court said, "Where a plaintiff claims to have been  
2 treated unfairly in a zoning/building context, he must plead  
3 specific examples of applications and hearings that were  
4 similar to plaintiff's application and demonstrative of the  
5 disparate treatment."

6           Although the similarly situated standard for  
7 selective enforcement claim is less stringent than the one for  
8 a class of one claim, see, e.g., *New Page at 63 Main versus*  
9 *Incorporated Village of Sag Harbor*, 2016 WL 8653493 at \*20-21  
10 (E.D.N.Y., March 19, 2016); *Mosdos*, 815 F.Supp. 2d at 695-96,  
11 plaintiffs must still provide more than conclusory allegations  
12 and speculation that they were treated less favorably.  
13 *Rodrigues versus Incorporated Village of Mineola*, 2017 WL  
14 2616937 at \*6 (E.D.N.Y., June 16, 2017) is an example of a  
15 court holding the plaintiffs adequately alleged that a  
16 similarly situated comparator was treated differently than  
17 plaintiffs. In that case, plaintiffs listed six neighboring  
18 businesses that engaged in the same activities as plaintiffs  
19 that is operating outdoor facilities on their property, but  
20 unlike plaintiffs, the other businesses operated outdoor  
21 facilities without frequent visits from Village inspectors and  
22 some operated without permits. The plaintiffs also allege that  
23 the Village issued plaintiffs a summons for allowing the  
24 accumulation of filth, dirt, concrete dust and stones on a  
25 public place, but the Village did not issue a summons to a

1 neighboring business even though that same business had spilled  
2 concrete onto public streets. That's *Rodrigues* at \*6.

3           In another case, in contrast, *Joglo Realties Inc.*  
4 *versus Seggos*, 229 F.Supp. 3d 146, 157 (E.D.N.Y., 2017), the  
5 court dismissed plaintiff's selective enforcement claim where  
6 plaintiffs allege their neighbors had violated the same  
7 environmental regulations plaintiffs were accused of violating,  
8 because the plaintiffs "failed to provide the Court with  
9 factual details that would allow the Court to infer that their  
10 neighbors have violated the relevant laws and regulations to  
11 such an extent that the violations could be fairly be compared  
12 with plaintiff's alleged infractions."

13           Plaintiff's allegations in this case are not nearly  
14 as detailed as the allegations in *Rodrigues* or even *Joglo*. As  
15 to the previous owner, plaintiffs do not allege that the  
16 previous owner ever applied for a certificate of occupancy. As  
17 to the other property owners on High Mountain Road, even if the  
18 conclusory allegations that their properties were, "similarly  
19 sloped," were sufficient, which it's not, plaintiffs do not  
20 allege that these property owners ever applied for grading  
21 permits or that they received grading permits with preferential  
22 conditions as compared to those imposed on plaintiffs.  
23 Likewise while plaintiffs allege that it was not Village  
24 practice to require an agreement that plaintiffs access road  
25 was not a Village road, they do not allege -- first they don't

1       allege that they were not properly responsible for that road,  
2       but moreover they don't allege that any other property owner  
3       had a similar access road or that responsibility for another  
4       access road was ever in dispute. Plaintiffs provide no facts  
5       about the comparator's properties or activities from which the  
6       court could infer they were, in fact, similarly situated but  
7       treated better in their interactions with defendants. See *New*  
8       *Page* at \*21, where the court dismissed an equal protection  
9       claim under either selective prosecution or class-of-one  
10      theories where the plaintiff neither identified a similarly  
11      situated restaurant nor offered any non-conclusory allegations  
12      suggesting all the neighboring in all material respects.  
13      *Segreto* at \*7, where vague allegations regarding the neighbors  
14      were insufficient given that there were no allegations that the  
15      neighbors had received permits that were denied to plaintiff  
16      and it was unclear whether the properties were similar.  
17      *Parkash versus Town of Southeast*, 2011 WL 5142669 \*8 (S.D.N.Y.,  
18      September 30, 2011) where the conclusory reference to  
19      unspecified similarly situated persons without accompanying  
20      examples was insufficient to state a selective enforcement  
21      claim, *aff'd* 468 F.App'x 80; and *cf. Whittle versus County of*  
22      *Sullivan*, 2017 WL 5197154 at \*7-8, one of my cases from  
23      November 8th of last year, where allegations of the similarly  
24      situated comparator were inadequate in an employment  
25      discrimination case where the plaintiff failed to provide facts

1 as to which colleagues submitted similar acts but were not  
2 fired, what those acts were, to whom those employees reported,  
3 what their responsibilities were and how their disciplinary  
4 histories compared to plaintiffs. By merely saying the  
5 comparators are similar without facts rendering that conclusion  
6 plausible, plaintiffs here have alleged but have not shown  
7 entitlement to relief. See *Iqbal* 566 U.S. 679. Accordingly  
8 they failed to plausibly allege the first prong of the  
9 selective enforcement claim.

10 They've also failed to plausibly allege the second  
11 prong; namely, that the defendants' actions were motivated by  
12 religious-based animus. The allegations in that regard are  
13 conclusory, e.g., paragraph 20 says, "Indeed, out of animus for  
14 plaintiffs based on the religion of plaintiff's principal..."  
15 Paragraph 43 says, "The religiously motivated discrimination to  
16 which defendant subjected plaintiff..." But there are no facts  
17 supporting these conclusions. They are nothing more than a  
18 personal opinion that defendants' conduct was motivated by  
19 intent to discriminate on the basis of religion, which is not  
20 enough to carry a selective enforcement claim past the motion  
21 to dismiss claim. See *Morales*, 22 F.Supp. 3d at 275.  
22 Plaintiffs must do more than allege that defendants knew Manes  
23 was Jewish and that something bad happened to plaintiffs.  
24 Plaintiffs do not allege that the defendants made comments to  
25 or about Manes suggesting discriminatory animus. Plaintiffs

1 fail to even allege circumstantial evidence of discriminatory  
2 intent, such as allegations suggesting history of religious  
3 discrimination or, as discussed above, facts suggesting that  
4 defendants favored similarly situated non-Jewish people, *cf.*  
5 *Hamzik versus Office for People with Developmental*  
6 *Disabilities*, 859 F.Supp. 2d 265, 279 (Northern District,  
7 2012). Plaintiffs have therefore failed to state a plausible  
8 selective enforcement claim.

9                 Turning now to the free exercise claim. The SAC  
10 alleges that the defendants' burdened the free exercise of  
11 religion in violation of the First Amendment which is  
12 applicable to the states through the Fourteenth Amendment.  
13 *Central Rabbinical Congress versus New York City* 763 F.3d 183,  
14 193. The protections of the free exercise clause pertain if  
15 the law at issue discriminates against some or all religious  
16 beliefs or regulates or prohibits conduct because it is  
17 undertaken for religious reasons. *Church of the Lukumi Babalu*  
18 *Aye versus City of Hialeah*, 508 U.S. 520, 532. The government  
19 may, however, enact generally applicable laws that happen to  
20 burden religious practice. *Newdow versus Peterson*, 753 F.3d  
21 105, 108. A law that is neutral and of general applicability  
22 need not be justified by a compelling governmental interest  
23 even if it has the incidental effect of burdening a particular  
24 religious practice. *Lukumi* 508 U.S. at 531.

25                 Defendants argue that the First Amendment claim rises

1 or falls with the equal protection claim, and plaintiffs do not  
2 dispute or even address this argument. I agree with the  
3 parties that on the facts here the claims do rise and fall  
4 together, because both depend on plaintiffs having plausibly  
5 alleged religious-based animus, which they failed to do.  
6 Plaintiffs have not alleged that the conditions and  
7 requirements imposed by defendants are not neutral or of  
8 general applicability or that they are designed to interfere  
9 with religious observation. Plaintiffs have merely set forth  
10 the conclusory allegations of religious-based animus that I  
11 discussed earlier and the conclusory assertion that the  
12 defendants burdened the free exercise of Manes's religion. See  
13 paragraph 49. Plaintiffs failed to allege that the conditions  
14 and requirements imposed by defendants substantially burden  
15 religious freedom or interfere with religious observation. See  
16 *Skoros versus City of New York*, 437 F.3d 1, 39, where the court  
17 said, absent a showing that the purpose of the challenged  
18 action was to impugn religious beliefs or restrict religious  
19 practices, free exercise claim will only be sustained if the  
20 government has placed a substantial burden on the observation  
21 of a central religious belief without a compelling governmental  
22 interest justifying the burden. A substantial interest exists  
23 where the state puts substantial pressure on an adherent to  
24 modify his behavior and violate his beliefs. *Newdow* 753 F.3d  
25 at 109; see *Jolly versus Coughlin*, 468, 476-77. Plaintiffs

1 make no attempt aside from the conclusory allegations mentioned  
2 earlier to allege a substantial burden on religious freedom.  
3 Even their sole conclusory allegation in paragraph 49 alleges  
4 only a burden, not a substantial one, and there are no facts  
5 rendering that conclusion plausible.

6           Accordingly, plaintiffs have failed to state a  
7 plausible free exercise claim.

8           In light of my disposition, I do not need to address  
9 of the qualified immunity or *Monell*.

10           In this case, taking the allegations of the SAC as  
11 true, as I must, plaintiffs have done a fine job of showing  
12 that the defendants indeed gave plaintiffs a hard time as  
13 alleged in paragraph 35 and treated them unfairly in ways for  
14 which they might have been entitled to address in an  
15 appropriate state court, but they have not alleged facts  
16 suggesting that they were treated unfairly because Manes was  
17 Jewish. They are fallen victim to the fallacy that, because  
18 they belong to a protected class, it is plausible that anything  
19 negative that happens to them is because of their membership in  
20 that class. See *Grillo versus New York City Transit Authority*,  
21 291 F.3d 231, 235, where the circuit said that, even if  
22 plaintiff's highly dubious claim that he was unfairly singled  
23 out for punishment by the instructors is credited, plaintiff  
24 has done little more than cite to his alleged mistreatment and  
25 asked the Court to conclude that it must have been related to

1 his race; and *Varughese versus Mount Sinai*, 2015 WL 1499618 at  
2 \*42 (S.D.N.Y., March 27, 2015), where the Court said it was a  
3 fallacy for the plaintiff to say, I belong to a protected  
4 class, something bad happened to me at work, therefore it must  
5 have occurred because I belong to a protected class. Those  
6 cases are equally applicable here. That reasoning is not  
7 sufficient. While it's conceivable that plaintiff's treatment  
8 here was based on religion, plaintiffs have not provided  
9 sufficient facts to nudge that conclusion over the line from  
10 the conceivable to the plausible. See *Iqbal* at 680.

11 Plaintiffs must provide specifics showing a plausible  
12 constitutional violation in order to overcome the otherwise  
13 proper reluctance of federal courts to get involved in local  
14 land use disputes, cf. *Filipowski versus Village of Greenwood*  
15 *Lake*, 2013 WL 3357174 at \*9 (S.D.N.Y., July 3, 2013).

16 I in no way intend to condone the imposition of  
17 unfair roadblocks in connection with land use, but such  
18 roadblocks are not necessarily redressable in federal court as  
19 civil rights violations. Just saying that there are other  
20 properties that are similar in some respect does not suffice to  
21 plausibly allege that those properties are roughly equivalent  
22 or similar in all material respects. If a plaintiff cannot be  
23 bothered to provide facts as opposed to conclusions regarding  
24 other purportedly similarly situated properties and how their  
25 owners were treated by the defendants, or if a plaintiff cannot

1 do so because no such facts exist, that plaintiff will have to  
2 confine itself to the ordinary state law remedies available to  
3 aggrieved property owners rather than a federal civil rights  
4 remedy.

5                 Finally, as to leave to amend, it should be given  
6 freely when justice so requires. It's within the sound  
7 discretion of the Court to grant or deny leave to amend, and  
8 though liberally granted, it may properly be denied for undue  
9 delay, bad faith or dilatory motive, repeated failure to cure  
10 deficiencies by amendments previously allowed, undue prejudice  
11 or futility. *See McCarthy versus Dunne and Bradstreet*, 482  
12 F.3d 184, 200; *Ruotolo versus City of New York*, 514 F.3d 184,  
13 191.

14                 Here plaintiffs have already amended twice after  
15 having the benefit of two premotion letters from defendants  
16 outlining their proposed ground for dismissal and my  
17 observations during the August 25, 2017 conference which  
18 focused on the complaint being strong on allegations of  
19 unfairness but weak on that unfairness being religiously based.  
20 Plaintiff's failure to fix deficiencies in the previous  
21 pleadings after being provided notice of them is alone  
22 sufficient ground to deny leave to amend *sua sponte*. *See In Re*  
23 *Eaton Vance* 380 F.Supp. 2d 222, 242 (S.D.N.Y., 2005) *aff'd* 481  
24 F.3d 110, 118 and *Payne versus Malemathew*, 2011 WL 3043920 at  
25 \*5 (S.D.N.Y., July 22, 2011).

1           Further, plaintiffs have not asked to amend again or  
2 otherwise suggested that they are in possession of facts that  
3 would cure the deficiencies identified in this opinion.

4           Accordingly, I decline to grant leave to amend *sua*  
5 *sponte*. See *TechnoMarine versus Giftports*, 758 F.3d 493, 505;  
6 *Gallop versus Cheney*, 642 F.3d 364, 369; see also *Loreley*  
7 *Financial versus Wells Fargo*, 797 F.3d 160, 190.

8           So, for the reasons just discussed, the motion to  
9 dismiss is granted.

10           The clerk of the court is to terminate motion number  
11 17 and close the case.

12           Sorry to drop bad news on you, Mr. Sussman, while  
13 you're in a bad place, but I think that takes care of our  
14 business here. I'll do a brief order of the saying that, for  
15 the reasons set forth on the record today, the motion is  
16 granted.

17           All right, thank you both.

18           MS. MASTELLONE: Thank you, your Honor.

19           THE COURT: Best of luck, Mr. Sussman.

20           (Proceedings concluded)

21

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25